

NUMBER 82-6248

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

LUIS TORRES-VALENCIA,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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The petitioner, LUIS TORRES-VALENCIA, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, San Francisco, California (Docket No. 82-1502) filed April 7, 1983, affirming petitioner's conviction in the United States District Court, Eastern District of California, Sacramento, California.

QUESTIONS PRESENTED FOR REVIEW

1. Were the character instructions prepared by defendant's counsel proper in light of the evidence adduced at trial?

2. If the character evidence is admitted at trial, must the trial court prepare and give an appropriate instruction to the jury even in the absence of a proper character instruction prepared by defendant's counsel?

3. Does the allowance of oral argument to the jury by defense counsel on the issue of character evidence satisfy the legal and due process necessity of an appropriate jury instruction on the subject?

PARTIES TO THE PROCEEDING

The petitioner was indicted with two co-defendants whose cases were severed and who were tried separately. Accordingly, there are no parties to the proceeding other than those named in the caption to this petition.

OPINION BELOW

A copy of the opinion below from the Court of Appeals for the Ninth Circuit, No. 82-1502, April 7, 1983, is attached as Appendix I.

STATEMENT OF JURISDICTION

On April 7, 1983, the United States Court of Appeals for the Ninth Circuit in Case No. 82-1502 (Appendix I) affirmed the conviction of the petitioner in the United States District Court for the Eastern District of California, Sacramento, California.

A petition for rehearing was not filed. No extension of time to file this petition was granted.

Petitioner files this petition in forma pauperis, through his counsel of record, the Federal Defender for the Eastern District of California, who was appointed to represent the petitioner under the Criminal Justice Act. Jurisdiction of this court is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION

Constitution, Amendment Five

"No person shall be . . . deprived of life, liberty or property, without due process of law"

STATEMENT OF THE CASE

Jurisdiction of the District Court

Jurisdiction of the District Court is predicated upon the allegation that the petitioner violated Title 21 U.S.C. § 846, Conspiracy to Distribute a Controlled Substance, and Title 21 U.S.C. § 841(a)(1), Possession with Intent to Distribute a Controlled Substance.

Statement of Prior Proceedings

This case was tried before a jury with the Honorable Milton L. Schwartz, United States District Judge, Eastern District of California, presiding.

Petitioner was found guilty of violating two counts of Title 21 U.S.C. § 841(a)(1) and one count of violating Title 21 U.S.C. § 846. Petitioner was sentenced to a term of three (3) years as to each count pursuant to Title 18 U.S.C. § 4205(a). The counts charging violations of

Title 21 U.S.C. § 841(a)(1) were ordered to carry a special parole term of ten (10) years and were made to run concurrently with each other and with the term imposed in the remaining count. Petitioner has been in continuous custody and serving his sentence since the time of his conviction.

STATEMENT OF FACTS

Three out of the four defense witnesses presented at the petitioner's trial testified to the defendant's good character as a law-abiding citizen inconsistent with those traits of character ordinarily involved in the commission of the type of crime with which the defendant was charged. The defendant timely moved on two separate occasions for an appropriate character instruction to be given to the jury.

Three character instructions were tendered to the Court by the defense. One was withdrawn. One was from Devitt and Blackmar and contained superfluous material relating to reputation evidence which was not presented in the case at bar. The third instruction reads as follows:

"Evidence of a defendant's character, inconsistent with those traits of character ordinarily involved in the commission of the crime charged may give rise to a reasonable doubt, since the jury may think it improbable that a person of good character in respect to those traits would commit such a crime.

The jury should consider such evidence along with all other evidence in the case.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence."

The trial court refused to give any instruction at all concerning the value that the jury could place on character evidence. The trial court did give the general instructions concerning the credibility of witnesses and examination of all of the evidence. Counsel was allowed to argue character evidence but was not allowed to argue based upon an instruction since there was no instruction given.

REASONS FOR GRANTING THIS WRIT

A. THE CHARACTER INSTRUCTION PREPARED BY DEFENDANT'S COUNSEL WAS PROPER IN LIGHT OF THE EVIDENCE ADDUCED AT TRIAL.

At trial, character testimony was properly admitted into evidence without objection. Three separate witnesses were offered by the defense for the sole purpose of admission of character testimony. All three witnesses gave opinion testimony which is allowed by Federal Rule of Evidence 405(a). All three witnesses testified to the effect that it was their opinion that the defendant was a law-abiding citizen and that he was not the type of person who would commit the type of crime charged.

The instruction set forth in the Statement of Facts herein is clear, concise, legally accurate and appropriately tendered to the trial court. In particular, it informs the jury that character evidence alone may give rise to a reasonable doubt. The jury never heard that instruction and found the defendant guilty in its absence.

In affirming the petitioner's conviction, the Ninth Circuit said merely that the "instructions prepared by

defendant's counsel were not proper in light of the evidence adduced at trial," citing United States v. Wolosyn, 411 F.2d 550, 551 (9th Cir. 1969). Petitioner has no idea what the Ninth Circuit would have wanted changed in his evidence or in his instruction to make it proper. Wolosyn, supra, is not much help since in that case apparently there was insufficient evidence for an instruction and no objection was made at the trial court level. The factual background of the case is not stated in the opinion.

- B. EVEN IF THE TRIAL COURT DID NOT FEEL THAT THE DEFENSE TENDERED AN APPROPRIATE CHARACTER INSTRUCTION, THE TRIAL COURT HAD A DUTY TO FASHION AND GIVE AN APPROPRIATE INSTRUCTION ONCE CHARACTER EVIDENCE HAD BEEN PROPERLY ADMITTED AND AN INSTRUCTION WAS REQUESTED.

As appropriately stated in Springer v. United States, 148 F.2d 411, 415 (9th Cir. 1945):

"It is true that it has been held in connection with instructions to the jury that it is the duty of the court to cover the issues involved even in the absence of request."

- C. WHEN CHARACTER EVIDENCE IS NOT MENTIONED IN ANY GIVEN JURY INSTRUCTION, THE GENERAL INSTRUCTIONS ON THE CREDIBILITY OF WITNESSES AND ORAL ARGUMENT DO NOT SATISFY THE DUE PROCESS REQUIREMENT OF AN APPROPRIATE INSTRUCTION ON THE SUBJECT.

The Ninth Circuit cited Michelson v. United States, 335 U.S. 469, 476 (1948), and Edgington v. United States, 164 U.S. 361 (1892), for the proposition that "the instructions given by the Court allowed the defendant to sufficiently argue his theory of the case." Neither case supports the proposition. The Michelson case, supra, has absolutely nothing to do with either instructions or oral argument.

The Edgington case, supra, stands for the exact opposite of the reason that it was cited. There must be a character instruction when character evidence has been admitted.

It was never an issue on appeal that the defendant was not allowed to argue. The issue was and is the failure of the trial court to give a proper instruction to the jury so that they could know how to appropriately dispose of their duties. The jury does not get their instructions on the law from oral argument, they get it from the court. No case has been found nor ever will be found (except the case at bar) where oral argument takes the place of proper instructions.

CONCLUSION

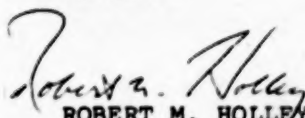
Even though the opinion below substantially changes the law in two major areas, it was not even elevated to a published opinion. The opinion below alleviates the trial court from the duty of fashioning an appropriate instruction on request when character evidence is before it. The opinion below allows general instructions on evidence and oral argument to take the place of specific requested instructions on properly admitted character evidence. The petitioner appreciates the fact that this Honorable Court must have thousands of these petitions presented to it each month. All that the petitioner asks is that the Court take a good hard look at the injustice which occurred in the case at bar and in finding that the petitioner has been treated unfairly, grant this petition.

For the foregoing reasons, petitioner prays that his petition for this Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Respectfully submitted,

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APR 8 1983

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,)	NO. 82-1502
Plaintiff-Appellee,)	D.C. No. Cr. S-81-81 M.S
v.)	<u>MEMORANDUM</u>
LUIS TORRES-VALENCIA,)	
Defendant-Appellant.)	

Argued and Submitted -- March 17, 1983

Appeal from the United States District Court
for the Eastern District of California
Honorable Milton L. Schwartz, District Judge, Presiding

Before: Hug and Farris, Circuit Judges, and
Irving, District Judge*

Torres-Valencia appeals from his conviction of conspiracy to distribute, and possession of heroin. Defendant argues the District Court erred in refusing to give a character evidence jury instruction. The instructions prepared by defendant's counsel were not proper in light of the evidence adduced at trial. United States v. Wolosyn, 411 F.2d 550, 551 (9th Cir. 1969). Further, the instructions given by the Court allowed

*The Honorable J. Lawrence Irving, United States District Judge from the Southern District of California, sitting by designation.

1 defendant to sufficiently argue his theory of the case. Michelson v.
2 United States, 335 U.S. 469, 476 (1948); Edington v. United States, 164
3 U.S. 361 (1892).

4 Therefore, the Court finds no error, and the judgment of the
5 District Court is AFFIRMED.

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Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, LUIS TORRES-VALENCIA, pursuant to Rule 46(1), Supreme Court Rules, and Title 18 U.S.C. § 3006A(d)(6), asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of costs, and to proceed in forma pauperis.

Petitioner qualified for appointment of counsel under the Criminal Justice Act and the Federal Defender for the Eastern District of California was appointed to represent him in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit. The Federal Defender has represented petitioner at all stages of the

appeal proceedings against him and is continuing to represent him under the Criminal Justice Act. Petitioner continued to qualify for appointment of counsel under the Criminal Justice Act.

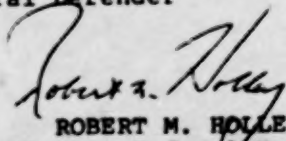
It is therefore respectfully requested that petitioner be allowed to proceed in forma pauperis.

DATED: May 26, 1983

Respectfully submitted,

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